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Foreword

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Introduction

Stanley Forman Reed was born in Mason County, Kentucky on December 31, 1884 and died on April 3, 1980 in Huntington, New York at the age of ninety-five.[1] He thus lived longer than any of the other 101 justices who have served on the United States Supreme Court. Reed served on the Court from 1938 to 1957, and in those nineteen years he wrote 339 opinions: 231 Court opinions, 20 concurring, and 88 dissenting opinions.[2] For many years after his retirement from the Supreme Court he continued as an active senior jurist serving on lower federal courts.[3] As he was reviewing material for a case before an appellate court, Reed mentioned that such work was the same as that of the Supreme Court and that he was too rusty on trial procedure to serve on a district court.[4] On another occasion, however, he expressed enthusiasm for such trial court work, stating that he enjoyed having complete run of a court.

My association with Justice Reed began about 1954, and, during the next few years, I profited from many conversations in his Supreme Court chambers. Most of our talks concerned the first amendment,[5] but we touched upon numerous other

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[1] N.Y. Times, Apr. 4, 1980, § A, at 23, cols. 1 & 2.

[2] For these figures I am indebted to Professor Henry J. Abraham of the University of Virginia.

[3] Reed stepped down from the Supreme Court but did not resign from the federal judiciary. The law permits justices over 70, with at least 10 years of service, to retire at full pay, to keep their office and to accept assignments from the Chief Justice to lower courts. 28 U.S.C. §§ 294, 371 (1977).

The last recorded assignment for Reed was to the U.S. Court of Claims and was made by Chief Justice Warren Burger for the period from November 11, 1971 to June 31, 1972. 92 S.Ct. 11 (1971).

[4] Interview with Justice Reed in Reed's Supreme Court chambers in Washington, D.C. (Dec. 8, 1959).

[5] These conversations took place while I was preparing a book. They continued for a time after publication of that book, entitled F. O'Brien, Justice Reed and the First Amendment: The Religion Clauses (1958). Our correspondence gradually

topics related to his life and judicial philosophy. This foreword proposes to survey such matters in a sketchy manner, adding my personal observations where possible.

Stanley Reed's father was a wealthy physician,[6] and his family's financial condition afforded him a broad university education usually reserved for the more affluent. After public instruction in local schools, Reed received a Bachelor of Arts degree from Kentucky Wesleyan College in 1902. In 1906 he earned another Bachelor of Arts degree from Yale University, where he was awarded the Bennett Prize in history. Economics and history were his major subjects at Yale.

While Reed was at Yale, William Graham Sumner was the University's brightest luminary in sociology and political economy. An undisputed exponent of *laissez-faire*, he strongly opposed government intervention in business matters, even when the general welfare seemed to demand it.[7] Reed commented in early 1958 that Sumner had made more of an impression on him than had any other Yale professor, first because of Sumner's insistence that persons of talent and position had a duty to enter government service to assist others and second because of his belief that each generation could add something to improve mankind.[8] Reed, of course, spent most of his adult life in government service but never manifested any Sumnerian influence in his public activities.[9] It is thus most difficult to explain Reed's praise of Sumner, one who so adamantly opposed improvement of economic and social conditions by government intervention. But since Reed's statement to me was made fifty years after his days at

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tapered off and then ceased about 1966.

[6] For all the vital statistics, see WHO'S WHO IN AMERICA 2606 (37th ed. 1972-73). A much more detailed account is contained in Fitzgerald, Justice Reed: A Study of a Center Judge (1950) (unpublished dissertation for a doctor's degree in political science at the University of Chicago). *See generally* N.Y. Times, Jan. 16, 1938, at 1, col. 1, & at 36, col. 4.

[7] 15 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES 406 (1968).

[8] Interview with Justice Reed (Jan. 28, 1958). Reed somewhat sadly commented that his two sons had not followed Sumner's first injunction: they both had turned to private law practice.

[9] Fitzgerald, *supra* note 6, at 9. Reed's long association with the Federal Farm Board, the Reconstruction Finance Corporation and finally with New Deal litigation in the courts all deny any taint of economic *laissez-faire*.

Yale, perhaps his power of recall had somewhat weakened and the praise should really have been bestowed on some other Yale professor.

From 1906-1909 Reed engaged in the study of law, first at the University of Virginia and then at Columbia University. Interestingly, at this time Harlan Fiske Stone, who was to serve as Chief Justice of the Supreme Court during Reed's first few years on the high bench,[10] was a member of Columbia's law faculty. Reed's formal education was completed between 1909 and 1910 when he attended the University of Paris with the status of *auditeur bénévole.*

On May 11, 1908 Reed married Winifred Elgin. He was admitted to the Kentucky bar in 1910 and began his practice of law in his home town of Maysville. Almost immediately he entered a campaign for the Kentucky legislature, and from 1912 to 1916 he held his only elective office as a state assemblyman. During these years he sponsored a child-labor law and a workman's compensation act. In 1912 Reed attended the Democratic National Convention in Baltimore, and, as chairman of the Kentucky Democratic Party, he was instrumental in bringing Woodrow Wilson to Kentucky that year for an important address.[11] Reed had thought that Wilson might award him a government position in Washington. He had always wanted to locate in the capital and particularly coveted the position of assistant attorney general. The president, however, offered him a position as counsel for one of the departments.[12] Reed declined, not wanting to be buried in such a position. In 1918 he entered the United States Army and served as a first lieutenant.[13] When Fred Vinson ran for Congress in 1922, Reed managed Vinson's campaign in one section of his Kentucky district.[14] Reed wistfully observed to me that he had thought he might have received the nod to run

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[10] Beard, *Prefatory Note* to S. KONEFSKY, CHIEF JUSTICE STONE AND THE SUPREME COURT at xvi (1945).

[11] Interview with Justice Reed (Jan. 28, 1958).

[12] *Id.*

[13] WHO'S WHO IN AMERICA 2606 (37th ed. 1972-73); N.Y. Times, Apr. 4, 1980, § A, at 23, col. 2.

[14] Interview with Justice Reed (Jan. 28, 1958). Reed served on the Court under Chief Justice Vinson from 1946 to 1953.

instead of Vinson, but that "it was decided otherwise."[15]

As a lawyer in Kentucky for more than twenty-five years, Reed gained much experience with corporation law by acting as counsel for such large concerns as the Chesapeake & Ohio Railroad and the Kentucky Burley Tobacco Growers Association.[16] Between 1929 and 1932 Reed served as general counsel for the Federal Farm Board, and in December of 1932 President Hoover named him to the important post of general counsel for the Reconstruction Finance Corporation.[17] Reed continued in this position during President Franklin D. Roosevelt's administration until Roosevelt appointed him as Solicitor General in 1935.[18] As Solicitor General, Reed represented the United States government before the Supreme Court in a number of leading cases involving New Deal legislation.[19] In 1935 he lost decisively in the case of *Schechter Poultry Corp. v. United States.*[20] Reed, however, had foreseen the weakness of the government's position here and had warned against testing the National Recovery Act through this vulnerable case.[21] In 1937 the Solicitor General successfully persuaded a divided Court to accept the constitutionality of the Wagner Labor Act in *NLRB v. Jones & Laughlin Steel Corp.*,[22] thereby winning a victory for the government in its attempts to implement New Deal legislation.

By this time Reed had proven that he was a highly-qualified lawyer as well as a devoted supporter of the New Deal.[23]

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[15] *Id.*

[16] N.Y. Times, Apr. 4, 1980, § A, at 23, col. 2; Fitzgerald, *supra* note 6, at 11-17.

[17] Fitzgerald, *supra* note 6, at 17.

[18] N.Y. Times, Mar. 19, 1935, at 9, col. 2.

[19] N.Y. Times, Jan. 16, 1938, at 1, col. 2; 59 REPORT OF N.Y. STATE BAR ASS'N 431-33 (1936).

[20] 295 U.S. 495 (1935).

[21] *See* Reed's correspondence with Roosevelt, as reported on in C. LEONARD, A SEARCH FOR A JUDICIAL PHILOSOPHY: MR. JUSTICE ROBERTS AND THE CONSTITUTIONAL REVOLUTION OF 1937, at 66 (1971). Perhaps it is more correct to say that Reed would have preferred that the government had never prosecuted the Schechter brothers in the first place.

[22] 301 U.S. 1 (1937).

[23] High praise came from Attorney General Horace S. Cummings when testifying at Senate committee hearings. N.Y. Times, Jan. 21, 1938, at 3, col. 3. For a discussion of the enthusiasm of the bar on Reed's nomination to the Court, see C. CURTIS, LIONS UNDER THE THRONE 193 (1947).

He was accepted universally as a supporter of liberal economic government programs and as a broad constructionist of the Constitution.[24] He was not, however, an exponent of radical views but was rather a civil and urbane realist convinced that the Constitution suffered no violence when properly adjusted to meet problems not anticipated by the founding fathers.

In January of 1938 Justice George Sutherland resigned from the Supreme Court; Roosevelt immediately named Reed as his successor.[25] There was general euphoria over his nomination, and he easily won confirmation on January 25.[26] During the previous summer, Reed had been a logical choice to succeed Justice Willis Van Devanter when he vacated his seat on the bench. But, as many acute observers at the time correctly perceived, Stanley Reed was not very aggressive, and as his first appointment to the Supreme Court Roosevelt wanted a "militant."[27] Roosevelt found such a nominee in the fighting New Deal Senator from Alabama, Hugo F. Black.

Soon after Reed's confirmation, the Court began to address cases involving first amendment liberties, criminal procedural guarantees and civil rights for blacks. In the postwar period, provocative constitutional questions were raised about how best to combat Communism in the United States. The Supreme Court was sharply divided over these and allied subjects. In 1953 Carl Brent Swisher, then professor at Johns Hopkins, wrote: "In a group of nine in which many were highly controversial characters, Justice Reed remained largely uncontroversial. . . . [H]e wrote opinions conventionally as a justice and not as a crusader for particular theories or practices. In public observation he remained a quiet figure while controversy raged around him. . . ."[28]

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[24] N.Y. Times, Jan. 16, 1938, at 36, col. 2.

[25] *Id.* at col. 1. That both Hoover and Roosevelt found responsible posts in their administrations for such a person speaks well for the man and his philosophy of government. Additionally, his nomination to the Court won wide acclaim from both parties. *Id.*

[26] *Id. See* H. ABRAHAM, JUSTICES AND PRESIDENTS 204 (1974).

[27] N.Y. Times, Aug. 15, 1937, § 4 (Editorials), at 3, col. 1. This is clearly suggested by H. ABRAHAM, *supra* note 26, at 200.

[28] C. SWISHER, AMERICAN CONSTITUTIONAL DEVELOPMENT 1066 (2d ed. 1954). Of

I. JUSTICE REED AND CIVIL RIGHTS

Reed, however, did not escape the shafts and scorns of many Court critics who manifested disappointment that the liberal New Dealer established a rather conservative voting record in the area of civil liberties.[29] Admittedly, the words "liberal" and "conservative" are inexact terms in any political lexicon. Most frequently, however, a judge is categorized as liberal if in civil rights cases he votes to uphold the claims of individuals in confrontation with the omnipotent state. A judge disposed to support the government is frequently labeled as a conservative.[30]

In 1948 one Court follower wrote that Reed, Jackson, Burton and Vinson were considered "the civil liberties laggards on the Court," but he qualified this statement by adding that they were "far indeed from being Rankins or Gerald Smiths."[31] About the same time another writer penned these words: "The subject on which Reed hit his literary high is treatment of Jehovah's Witnesses, an issue on which he generally upholds local ordinances against the religious sect."[32]

When Reed resigned from the Court, the *New York Times* carried an editorial of high praise, but nonetheless it referred to him as a member of "the more conservative group on the Supreme Court bench."[33] On the same occasion, Arthur Krock preferred to call him a "moderate progressive."[34] Krock observed that in the previous nineteen years the Court had

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the many former clerks of Justice Reed whom I have interviewed, none ever had an unkind word to utter about this "parfit gentil knyght," but several spoke of his dislike of "theories." Harold Leventhal, for instance, wrote me that "he has limited facility for abstract theory or doctrine. . . . He avoids 'absolutes' for more than one reason—but that lack of facility is part of what breeds that mistrust." Letter from Harold Leventhal to Francis William O'Brien (June 24, 1957). See text accompanying note 93 *infra* for further evidence of this attitude.

[29] *See, e.g.*, W. MCCUNE, THE NINE YOUNG MEN 66 (1947); C. PRITCHETT, THE ROOSEVELT COURT 131, 141, 190, 226 (1948); F. RODELL, NINE MEN 268 (1955); Frank, *The United States Supreme Court: 1950-51*, 19 U. CHI. L. REV. 222-23 (1952).

[30] O'BRIEN, *supra* note 5, at 197-98.

[31] Frank, *The United States Supreme Court: 1947-48*, 16 U. CHI. L. REV. 1, 33 (1948).

[32] W. MCCUNE, *supra* note 29, at 65.

[33] N.Y. Times, Feb. 1, 1957, at 24, col. 2.

[34] *Id.* at col. 5.

moved "from conservative to radical, from radical to moderate and from moderate to radical again—while he had followed the line of legal reasoning he brought to the high bench."[35] Speaking of Reed's early years on the Court, Krock wrote:

> Reed felt at home with the new majority, and his deviations by dissent were only when, with Hughes, Brandeis, Stone or Roberts—like himself lawyers of deep experience—he could not go along with what he considered the judge-made amendments of the Constitution implicit in the opinions of Black, Felix Frankfurter, William O. Douglas and Frank Murphy. . . .[36]

This was an over-generalization, but Court historians will perceive in it more than a modicum of truth. The belief that Reed was a conservative in civil rights matters has persisted in many circles, a belief reflected in *Facts on File,* which in its summary announcement of Reed's death said that he "was noted for his support of New Deal legislation and his restrained view of civil liberties. . . ."[37]

Reed often appeared to be disturbed by such characterizations. On one visit to his chambers,[38] I brought in a book whose dust jacket carried the observation that Reed had turned conservative on the bench. The justice reacted adversely, stating he could not figure out the reasoning of such critics. He immediately brought up the case of *Brown v. Board of Education*[39] and strongly protested reports that he had been the most reluctant of the nine in that case. Several responsible sources indicated that both Reed and Frankfurter originally had decided to dissent, only to be dissuaded from such action by the persuasive Chief Justice Earl Warren. Reed scoffed at the whole idea, observing that a simple perusal of earlier decisions should have convinced anyone that the *Brown* ruling was inevitable.[40] Bringing forth volumes of the

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[35] N.Y. Times, Feb. 3, 1957, § 4 (Editorials), at 3, col. 2.

[36] *Id.*

[37] Facts on File, May 9, 1980, at 360, col. 3.

[38] Interview with Justice Reed (Jan. 28, 1958).

[39] 347 U.S. 483 (1954).

[40] Interview with Justice Reed (Jan. 28, 1958). See R. BURGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 118-33, 342 (1977),

United States Reports, Reed pointed to his majority opinion in *Smith v. Allwright*,[41] which outlawed the white primary. With equal pride he opened a volume to his opinion for the Court in *Morgan v. Virginia*,[42] which struck down state laws requiring segregated seating of passengers on interstate buses.

II. JUSTICE REED AND THE FIRST AMENDMENT

Reed always manifested his greatest air of triumph when he discussed his dissent in *McCollum v. Board of Education*[43] in which eight members of the Court struck down a program in Champaign, Illinois that allowed school classrooms to be used one-half hour a week by ministers of religion for the instruction of children whose parents had so requested. Reed simply could not detect the slightest infringement of religious freedom,[44] and thought historical practices as old as the nation itself proved that the program in no way impinged adversely on the establishment clause of the first amendment.[45] On both points he had the support of many knowledgeable constitutional law scholars.[46] As for his own mail, Reed con-

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where the author wrote only of Justices Jackson and Frankfurter as being strongly hesitant about justifying the 1954 decision by use of the 1868 amendment. He merely refers to Reed as one of four "probable dissenters if the Court voted to overturn *Plessy* in the spring of 1953." *Id.* at 128 (quoting R. KLUGER, SIMPLE JUSTICE (1976)).

One clerk confided that Reed was weeping as the justices left the bench after Warren delivered the *Brown* opinion.

[41] 321 U.S. 649 (1944).

[42] 328 U.S. 373 (1946).

[43] 333 U.S. 203, 238 (1948) (Reed, J., dissenting).

[44] *Id.* at 240-41.

[45] *Id.* at 244. Here, as in other places in his dissenting opinion, Reed relied heavily on Jefferson and Madison for a contemporary interpretation of the "establishment" clause.

Frequently I would find Reed deep in the volumes of the *Congressional Record* or some other early documents to learn what the original drafters had intended by some statute or constitutional provision. Part of Reed's judicial philosophy was captured by Frankfurter when he wrote: "[A]n amendment to the Constitution should be read in a 'sense most obvious to the common understanding at the time of its adoption.'" Adamson v. California, 332 U.S. 46, 63 (1947) (Frankfurter, J., concurring).

[46] *E.g.*, Corwin, *The Supreme Court as National School Board*, 14 LAW & CONTEMP. PROB. 3 (1949); Katz, *Freedom of Religion and State Neutrality*, 20 U. CHI. L. REV. 426 (1953); Meiklejohn, *Educational Cooperation Between Church and State*, 14 LAW & CONTEMP. PROB. 61 (1949); Meyer, *The Blaine Amendment and the Bill of Rights*, 64 HARV. L. REV. 939 (1951); Murray, *Law or Prepossessions?*, 14 LAW & CON-

fided that no opinion had ever won for him such a number of favorable letters—"ten times more than any other."[47]

In 1951 the Court apparently reassessed its *McCollum* position and virtually reversed itself in *Zorach V. Clauson.*[48] Reed once bluntly commented that "the Court simply adopted the *McCollum* dissent."[49] There is no justification for those critics disposed to catalogue Reed's votes in these cases as illiberal. On the contrary, his votes clearly seem to be victories for religious freedom, for an unbiased reading of history and for judicial restraint in an area of parental rights where such restraint is clearly proper.

Did Reed manifest a want of liberalism in cases involving freedom of speech and the freedom to distribute religious literature? It is impossible to analyze here the multitude of such cases, with all their varied subtleties, which demanded his scrutiny. Still, a general review of the Jehovah's Witnesses cases and their progeny which the Court reviewed during his tenure is enlightening as to Reed's stance on these first amendment issues. In the two flag-salute cases,[50] Reed voted

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TEMP. PROB. 23 (1949).

[47] Interview with Justice Reed (Dec. 2, 1955).

[48] 434 U.S. 306 (1952). There was this difference from the *McCollum* case: in the New York plan no religion class was held on school property; children were simply released from a regular class period to take instruction at their own churches. But the dissenting Justices, Black, Frankfurter and Jackson, saw no significant difference allowing escape from the "no aid" principle on which the *McCollum* ruling was grounded. *Id.* at 315, 320, 323. This principle was first stated in Everson v. Board of Educ., 330 U.S. 1, 18 (1947), in which the Court found no violation of the first and fourteenth amendments in providing transportation for children by public buses to parochial schools. Reed, of course, had never accepted this principle.

[49] Interview with Justice Reed (Dec. 2, 1955).

[50] West Va. State Bd. of Educ. v. Barnette, 319 U.S. 586 (1943); Minersville School Dist. v. Gobitis, 310 U.S. 586 (1940). In *Barnette*, Frankfurter wrote a long dissenting opinion which defended the school board's right to demand the flag-salute. 319 U.S. at 646-71. Reed and Roberts did not join in this opinion, although they also dissented from the Court's decision against the compulsory salute on grounds set forth in the Court's opinion in *Minersville.* 310 U.S. at 642-43.

Reed once remarked that he had not joined Frankfurter's dissent in the 1943 flag-salute case because of Frankfurter's words denying the "preferred position" doctrine and because of his statements on Jews. Interview with Justice Reed (Dec. 2, 1955). Justice Frank Murphy tried to get Frankfurter to omit his reference to Jews as being too personal and therefore improper for a Court opinion. J. LASH, FROM THE DIARIES OF FELIX FRANKFURTER 254 (1975).

to sustain a school board and a state law against the Witnesses' protests that this gesture of patriotism violated their interpretation of the Bible. Thus, it would appear that here Reed did not display a proper regard for the legitimate claims of religious conscience.

The largest number of cases brought to the Court by this sect, however, touched upon the rights asserted by its members to distribute literature on the streets or in private homes or to preach in public places without permits from local authorities.[51] Not until 1942 did Reed begin to vote consistently against the rights asserted. His opinions merit close reading, for they are generally carefully reasoned and do not bear the stamp of a narrow spirit. In so doing, readers should keep in mind that Reed was always a man of pronounced civilities who believed that even constitutional rights should be exercised only with proper regard for the legitimate claims of the general public. The Witnesses, on the other hand, frequently pursued their apostolic mission—at least at that time—with untoward aggressiveness and in ways highly offensive to members of other sects.[52] This fact may well have predisposed the genteel Reed to look benignly on the restrictions imposed on the Witnesses by public officials.

In *Saia v. New York*,[53] Frankfurter, Reed, Burton and Jackson dissented when the court invalidated a city ordinance prohibiting sound amplifiers in public places without permission of the chief of police. The dissenters may have been the real liberals in this case. The dissenters wrote that the "appellant's loudspeakers blared forth in a small park in a small city"[54] and that the ordinance was a reasonable safeguard of "the rights of others not to be assailed by intrusive noise."[55] In a separate dissent, Justice Jackson stated more bluntly that the Court's decision seemed "to endanger the great right

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[51] It has been reported that the Witnesses brought 45 cases to the Supreme Court. 16 ENCYCLOPEDIA AMERICANA, *Jehovah's Witnesses* 11 (1980). Because of space limitations only a limited number of the more significant cases will be cited below.

[52] *See* 10 ENCYCLOPEDIA BRITANNICA, *Jehovah's Witnesses* 131 (15th ed. 1978).

[53] 334 U.S. 558, 562 (1948) (Frankfurter, J., dissenting, with Reed, J., and Burton, J., concurring).

[54] *Id.*

[55] *Id.* at 563.

of free speech by making it ridiculous and obnoxious."[56]

Kovacs v. Cooper[57] did not concern religious speech but did involve actions not unlike those in the Witnesses cases. Reed's opinion upheld a city ban against use of "loud and raucous" amplifiers on streets and public places. He admitted to me that his *Kovacs* opinion was not free from weaknesses, but he asserted that *"Saia* had to be undone."[58] In *Martin v. City of Struthers,*[59] he dissented when the Court reversed the conviction of certain Witnesses who in violation of a city ordinance knocked on strangers' doors and rang doorbells to distribute religious literature. In *Breard v. Alexandria,*[60] Reed penned the majority opinion upholding a city ordinance that prevented uninvited vendors of merchandise and magazines from visiting private homes. He wrote that the ordinance simply prohibited "opportunists" from "crushing the living rights of others to privacy and repose."[61]

Reed's dissent in *Marsh v. Alabama*[62] protested the majority's ruling that a privately-owned town could not close its streets to the distributors of literature. Mrs. Marsh was a Jehovah's Witness. Reed argued that the decision implied that private property in general could be commandeered for any religious purpose.[63] In 1946 he joined the dissenters in *Tucker*

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[56] *Id.* at 566.

[57] 336 U.S. 77 (1949).

[58] Interview with Justice Reed (Dec. 3, 1955). Reed stated that he was virtually forced to write an ambiguous opinion to win over a majority for a decision that would help control a highly disturbing problem for many cities. *Id. Saia* was not technically overruled, but *Kovacs* did give authorities powers which *Saia* denied them. Corwin wrote "so much the better" if *Kovacs* overruled *Saia.* Corwin, *supra* note 46, at 8 n.23a.

[59] 319 U.S. 141, 154 (1943) (Reed, J., dissenting). For Justice Jackson's dissenting opinion with its references to the Witnesses' provocative activities, see 319 U.S. at 166, 171.

[60] 341 U.S. 622 (1951). Here religion was no issue. Breard was not a Jehovah's Witness.

[61] *Id.* at 625-26.

[62] 326 U.S. 501, 511 (1946) (Reed, J., dissenting). Reed confided that he felt quite deeply over the implications of the *Marsh* ruling if considered from the principles of "our type of capitalism." Interview with Justice Reed (Dec. 2, 1955).

[63] 326 U.S. at 514-15. In picketing cases, Reed was generally in step with the full court from 1940 to 1950. A. KELLY & W. HARBISON, THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT 840-42 (5th ed. 1976). But in International Bhd. of Teamsters Local 309 v. Hanke, 339 U.S. 470, 481 (1950), Reed, Black and Minton dissented

v. Texas,[64] a similar case involving a federally-owned village managed by the Federal Public Housing Authority. Reed may have been too restrained in not extending first amendment freedoms to persons such as Tucker, but he did sound a reasonable alarm to the dangers lurking in the theory of "state action" as it relates to private property.[65] Recent disenchantment with big government and concern over the intrusions of oppressive governmental bureaucracy might well reinforce many of Reed's premonitions.[66]

Several commentators have written that Reed's decisions defied prediction, implying that his voting record lacked consistency.[67] Reed clearly was not a crusader for any particular cause or theory; he often observed that he simply looked at the facts in a controversy and decided the case on its own merits. An excellent example of this approach is *Terminiello v. Chicago*,[68] which involved a monger of hate and racism who gave a highly inflammatory speech to persons of similar sentiments assembled in a Chicago auditorium. Outside the auditorium a huge and turbulent crowd protested in a most vigorous fashion. Subsequently, Terminiello was convicted of disorderly conduct under a "breach of the peace" statute.[69] Reed joined the majority in a five to four decision reversing the conviction. The *New York Times* wrote with evident surprise that "the Court's 'middle-of-the roader' " was responsible for the

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from a decision against "peaceful publicity, not enmeshed in a pattern of violence." *Id.* at 481. The issues involved in cases such as *Marsh* and *Saia* were not present in that case.

[64] 326 U.S. 517, 521 (Stone, C.J., Reed, J., and Burton, J., dissenting).

[65] In an earlier California case, certain Jehovah's Witnesses insisted on their "constitutional" right to invade a hotel on Sunday morning and arouse the sleeping guests. They lost in People v. Vaughn, 150 P.2d 964 (Cal. App. Dep't Super. Ct. 1944).

[66] The current "rights" explosion, with even children bringing suits against parents, may well have its roots in the 1940's when the Court gave strong encouragement to many people by granting certiorari improvidently when the issue posed should have been settled in some other forum.

[67] "Reed's decisions often defied prediction. . . ." Facts on File, May 9, 1980, at 360, col. 3. The New York Times obituary said that "his voting record often confounded critics. . . ." N.Y. Times, Apr. 4, 1980, § A, at 23, col. 1.

[68] 337 U.S. 1 (1949).

[69] *Id.*

narrow pro-speech vote.[70] Although Reed's vote in *Terminiello* appeared to diverge from his previous pronouncements on the first amendment, there actually was no inconsistency. No one was compelled to hear Terminiello's offensive and obnoxious words; the auditorium was filled with willing listeners only. In the previous cases, however, there was either an invasion of privacy or some measure of compulsion of others on the streets.

In the 1941 case of *Bridges v. California*,[71] Reed joined Black's five to four opinion that reversed the contempt of court convictions of the Los Angeles *Times-Mirror* and of a powerful union leader. In 1946, in *Pennekamp v. Florida*,[72] Reed wrote the unanimous Court opinion reversing the Miami *Herald's* conviction for contempt of court based upon its editorials critical of the administration of justice by a Florida court. Both of these decisions stretched freedom of the press to rather extreme lengths in order to protect actions that might easily have intimidated judges and resulted in miscarriages of justice. In neither instance, however, was there a privacy issue similar to that involved in cases like *Martin v. City of Struthers*.[73] In the 1952 case of *Beauharnais v. Illinois*,[74] Reed dissented when five justices voted to uphold a state group libel statute.[75] Here he showed practical realism in determining that the words in the statute—"virtue," "derision,"

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[70] N.Y. Times, May 22, 1949, § 4 (Editorials), at 1, col. 7.

[71] 314 U.S. 252 (1941). On November 15, 1946, Frankfurter wrote:

> Stanley was counsel for the B. & O. Railroad and other big concerns, and . . . when he was appointed to the Court there was a prophecy that he would be a conservative. . . . I think he is going whole hog in these cases just to refute folk who thought he was going to be conservative.

J. LASH, *supra* note 50, at 288. Here Frankfurter does not mention the *Bridges* case, but he probably had it in mind.

But see Reed's majority opinion, upholding an injunction against violent picketing by union members, in United Auto Workers v. Wisconsin Employment Relations Bd., 351 U.S. 266 (1956).

[72] 328 U.S. 331 (1946). Here the editorials did not impact upon the peace or privacy of the public or of individuals but only upon judges, and Reed opined that men of the robe had sufficient "fortitude" to resist such influence, negating any possibility of a "clear and present danger" to the fair administration of justice. *Id.* at 349.

[73] 319 U.S. at 141.

[74] 343 U.S. 250 (1952).

[75] *Id.* at 277 (Reed, J., dissenting).

and "obloquy"—were too vague to guarantee equitable application.[76]

III. THE PLURALIST JUSTICE REED

When Reed retired from the high bench he did so merely because he felt he no longer could do the kind of personal and careful research to which he had been accustomed. Mrs. Reed expressed to me her disappointment in her failure to persuade her husband that he was well equipped to continue to serve if he simply relied upon his many years of study and experience. Her husband dissented.[77]

On November 7, 1957, President Eisenhower nominated Reed to be chairman of the recently created Commission on Civil Rights.[78] As a universally respected Southerner, Reed seemed the perfect choice for such a post, but on November 15 he reversed his initial acceptance.[79] He stated that he had not retired from the federal judiciary and would still accept assignments to lower courts. Accepting the post, Reed thought, might cause disrespect for the judicial system.[80] Privately, Reed frankly admitted that he felt he was the ideal man for the position but that some people had predicted difficulty in his winning confirmation because of his anti-segregation vote in the *Brown* case, although Reed denied that any problem would arise.[81] He quoted a much admired lawyer who had told him, "You were wrong both times, when you took the job and when you resigned."[82]

In conversations with Reed, I once expressed an opinion that Chief Justice Warren had been led along the liberal path by Justice Black. Reed, however, disagreed, observing that

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[76] *Id.* at 283.

[77] Reed often remarked that he liked to do his own research whenever possible. He seemed to relish law journal articles, doctoral dissertations and any kind of documents that explored the original meaning of the Bill of Rights.

[78] N.Y. Times, Nov. 8, 1957, at 1, col. 1. The Commission was established as a fact-finding body for civil rights matters. Civil Rights Act of 1957, Pub. L. No. 85-315, § 104, 71 Stat. 635 (1957).

[79] N.Y. Times, Nov. 15, 1957, at 4, col. 3.

[80] *Id.*

[81] Interview with Justice Reed (Jan. 28, 1957).

[82] *Id.*

Warren did not need any persuasion for he had always espoused the liberal cause.[83] He then remarked that Warren had done much better than "we expected" and had displayed a surprising grasp of legal philosophy for one with such a limited legal background, adding that "he is a good administrator and runs his court."[84]

Reed was never a gossiper and he seldom if ever spoke an uncomplimentary word about his brethren. As Professor Swisher once wrote, "he engaged but little in the jibes at the beliefs and performances of other justices which characterized the performances of some of his colleagues."[85] As for the much reported Black-Jackson feud, Reed remarked that he had hardly known the feud existed.[86] He did add a general observation about Jackson, saying that "his expression was better than his thought and that he would rather show a fine phrase than depth or perfect correctness."[87] Such a remark was in keeping with the personality of the non-flamboyant Justice Reed who never himself strived for any colorful rhetoric. Regarding Chief Justice Fred Vinson, Reed opined that he had been underrated, that he had been a good lawyer with a fine memory for names, "even foreign" ones, a talent that "ingratiated him with all."[88]

Reed was clearly proud to have served under four chief justices, but Hughes was definitely his ideal. He said that Hughes was stately in appearance, gifted with an excellent memory, persuasive in conference and so exacting that "you had to be sure of your ground if you ever challenged him."[89] Reed remarked that as Solicitor General, he had by custom visited each justice at the beginning and end of each term.[90]

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[83] *Id.* When I remarked upon the evangelical vigor with which Black read his opinions from the bench, Reed replied that he was quite different in conferences. Apparently he meant that Black listened patiently and accepted the reasonableness of the opinions of his brethern.

[84] *Id.*

[85] C. SWISHER, *supra* note 28, at 1066.

[86] Interview with Justice Reed (Jan. 28, 1957).

[87] *Id.* It should be noted that Jackson had been dead five years when Reed made this remark.

[88] *Id.*

[89] *Id.*

[90] *Id.*

On one such visit to Hughes in 1937, at the time of the "Court-packing" plan, the Chief Justice warned him not to be misled by reports that Justice Willis Van Devanter was not doing his share of the work on the bench.[91] Hughes assured Reed that Van Devanter was an expert on procedure and said that for every case he presented the Court with a complete study of all procedural questions involved, thus contributing more than anyone to an easing of the justices' burdens.[92]

In 1955 I attempted to discern a pattern in Justice Reed's varied opinions and voting record. Upon entering Reed's Supreme Court chambers, I announced to Reed my conclusion that he was a pluralist. The response, uttered in a clear flat tone, was "I don't like it."[93] This was consistent with Reed's dislike and suspicion of doctrinaire theories and of sophisticated political jargon. Upon my asking permission to read him a portion of my manuscript, Reed agreed, stating that he would challenge only factual errors, not opinions. After I had read him the manuscript, Reed's expression remained unchanged, but I sensed that he was quite happy with the analyses and conclusions.[94]

The "pluralist" thesis includes analysis of Reed's early years in Kentucky when he worked with farm co-operatives, thus gaining the experience which, in 1929, prompted Hoover to name him general counsel for the Federal Farm Board. In that position he became associated with marketing co-operatives on a national scale. His work as general counsel for the Reconstruction Finance Corporation helped confirm his belief that individuals could become economic beneficiaries if affiliated with organizations nurtured by government aid. As Solicitor General he defended federal programs premised on a faith that government should help rehabilitate industries without sacrificing their self-government; notably, the production codes were written and enforced by representatives of the industries themselves. In 1937, with Reed arguing as Solicitor General, the Court awarded labor its greatest triumph in up-

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[91] *Id.*
[92] *Id.*
[93] Interview with Justice Reed (Dec. 2, 1955).
[94] *Id.*

holding a law protecting the right of workers to organize and to bargain collectively.[95] Thus, Reed had for years been repudiating economic *laissez-faire,* whether espoused by individual businesses or by individual workers.

On the Court, Reed was wary of *laissez-faire* even in the area of civil rights, as many of his opinions reviewed above seem to demonstrate. In these cases he defended local school boards, city councils and state legislatures against restive individuals claiming unusual personal rights under the first amendment. He was inclined to look beyond the particular claimant in court to the rights of the thousands of individuals whose voices could not be individually raised but who had to rely on the voice of the government attorney. In 1947, in *United Public Workers v. Mitchell,* [96] a challenge to a federal law put the issue squarely before the justices. The Hatch Act[97] prohibited government employees from active participation in political campaigns. Naturally there were a number of robust spirits who yearned to do active combat in the political arena. Reed's majority opinion, however, defended the right of the nation as a whole to protect the democratic process from pernicious influences. It also protected hundreds of thousands of other government workers from the importunate and dangerous "requests" of unscrupulous politicians for campaign contributions as well as for other visible displays of personal support.

In some cases Reed may have been overly disposed to protect the group and not sufficiently alert to the legitimate concerns of the truly oppressed individual. But in a complex and diverse society like America, an all-pervasive structure of federal government seems imperative. When highly contentious speech and exotic manifestations of religion are the issues, compromise and accommodation at local levels are ur-

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[95] NLRB v. Jones & Laughlin Steel Corp., 301 U.S. at 1.

[96] 330 U.S. 75 (1947). Reed's "pluralism" also seems clearly discernible in Kedroff v. St. Nicholas Cathedral, 344 U.S. 94 (1952). But William B. Rogers, Reed's clerk in 1958, "participated in the writing of this opinion" and assured me that in his personal view, the right defended was a "personal" not a "corporate one." He stated, however, that this was not necessarily Reed's view. Letter from William B. Rogers to Francis W. O'Brien (May 15, 1957).

[97] Hatch Act, ch. 640, 54 Stat. 767 (1940).

gently needed. This demands decision-making by groups or small government units. To deny the ability to do so would be an abridgement of democracy—a confession of public incompetence in one of the most vital areas of law-making activity.

If it seems that only by contrived artifices can Reed be classified as a pluralist,[98] there is abundant evidence that he at least generally manifested a salutary respect for federalism, separation of powers, group or collective activity and judicial restraint. On May 9, 1956, several weeks after Reed had himself read over the author's exposition on pluralism, he sent this brief handwritten note: "Thank you for the opportunity of reading the outline of your thesis. It is interesting to see what an intelligent scholar finds and thinks about on reading one's own work. You have helped me a lot in my own thinking. I like the thesis."[99] On February 24, 1958, shortly after the publication of the author's book,[100] Reed sent another handwritten letter. He said in part:

> I have now read your book from cover to cover . . . . A judge finds little time to chart his opinions by a definite judicial base line. When later the opinions are examined as a whole the general trend appears. Unfortunately, the opinions are not always consistent with a settled judicial philosophy. I see their deficiencies from your analysis. Thank you for your kindliness.[101]

Much more could be said about this recently departed patriarch of the federal judiciary. Perhaps, however, it is best to conclude at this point merely by quoting the words of the respected Edward S. Corwin, for many years the highly renowned professor of constitutional law at Princeton and a person universally known as "Mr. Constitution" because of his profound knowledge of that venerable document. His let-

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[98] Others besides this author have detected a tinge of pluralism in some of Reed's opinions and votes. *See, e.g.*, Howe, *The Supreme Court, 1952 Term-Foreward: Political Theory and the Nature of Liberty*, 67 HARV. L. REV. 91-95 (1953); Fitzgerald, *supra* note 6, at 382 (writing that in personal liberty cases, "Reed's legal and administrative background has been primarily concerned with fostering group and regional causes rather than individual causes").

[99] Letter from Justice Stanley Reed to Francis W. O'Brien (May 9, 1956).

[100] F. O'BRIEN, *supra* note 5.

[101] Letter from Justice Stanley Reed to Francis W. O'Brien (Feb. 24, 1958).

ter of May 16, 1957, penned after reading the author's article on pluralism,[102] contained this comment on Mr. Justice Reed: "I greatly regretted his retirement from the court because he has seemed to me for some years back the balance wheel of that sometimes pretty complicated machine. In other words, besides learning and broad experience, he had a level head and was never sport [sic] of preconceptions and prepossessions."[103]

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[102] O'Brien, *Mr. Justice Reed and Democratic Pluralism,* 45 GEO. L.J. 364 (1957). This article reviewed cases in a number of different areas. For Reed's own words of warning against excessive judicial activism, see his "A Constitutional Philosophy." Address by Justice Reed before the Juristic Society, Philadelphia (Feb. 16, 1950). Pertinent sections are reprinted in F. O'BRIEN, *supra* note 5, at 232-34.

[103] Letter from Edward S. Corwin to Francis W. O'Brien (May 16, 1957).

In 1970 some 65 law school deans, professors of law, history and political science were polled on Supreme Court justices. Justice Reed was rated among the 55 "average" justices since 1789. H. ABRAHAM, *supra* note 26, at 289-90. The poll did not indicate whether or not Reed rated in the high brackets of the "average."

Of the twelve justices rated "great," seven had been on the bench with Reed: Hughes, Brandeis, Stone, Cardozo, Black, Frankfurter and Warren. Of the fifteen "near greats," Reed served with five: Douglas, Jackson, Rutledge, Harlan II and Brennan. It is by no means improbable that Reed might be assessed differently by a panel of people such as Professor Corwin and his progeny in 1981.